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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

ORIGINAL COPY

No. 78-558

DAVID SANDSTROM,

Petitioner,

vs.

STATE OF MONTANA

Respondent.

FOR R SP

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF MONTANA

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

ARGUMENT

I. MULLANEY AND PATTERSON HAVE NOT BEEN VIOLATED

Petitioner alleges that the rulings of Mullaney v. Wilbur, 421 U.S. 684(1975), and Patterson v. New York, 432 U.S. 197(1977) have been violated in that the trial court relieved the state of its requirement to prove all elements of the crime charged . That is not the case before you. The error alleged is that the trial court gave the jury an instruction to the effect that the law presumes that a person intends the ordinary consequences of his voluntary acts.

Mullaney and Patterson are mandates by this Court

that the state in a criminal prosecution must prove each and every element of the crime charged as that crime is defined by state law. However, once having established, the existence of each and every element the state can require the defendant to prove an affirmative defense by a preponderence of the evidence. Patterson at 206. Rhay v. Browder, 342 F.2d 345, 349(9th Cir.1965).

In Mullaney malice aforethought was the element which distinguished the crime of murder from the crime of manslaughter. However, the element of malice was presumed to exist once the state proved that an unlawful homicide had taken place. The presumption relieved the state of any requirement to prove the intent element of the crime. A far cry from the evidentiary presumption challenged in this case.

This Court in Patterson upheld the New York requirement that a defendant must establish, by a preponderence of the evidence, the affirmative defense of extreme emotional disturbance. In other words, the state having proved intent, the defendant was required to establish extreme emotional disturbance by a preponderence of the evidence.

These mandates have not been violated by the trial court.

Under Montana law a person commits deliberate homicide if he purposely or knowingly causes the death of another human being.[1] In 1973 the criminal law of Montana was rewritten. One of the express purposes of the new Criminal Code was to do away with what is commonly known as "specific intent". Commission comment, Mont. Crim. Code 1973, Ann., p.73.; State v. Klein, 169 Mont. 350, 356, 547 P.2d 75(1976), State v. Sharbono, _____Mont. _____, 563 P.2d 61, 72-73(1977). In the present case what is required is that the defendant purposely or knowingly caused the death of another human being. Sections 94-5-101(1) and 94-5-102(1), R.C.M. 1947. A person acts purposely if it is his conscious object to engage in the conduct or cause the result.[2] A person acts knowingly when he is aware of his conduct.[3]

In other words in Montana there is no requirement

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1 Section 94-5-101(1), R.C.M. 1947, states:
A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

Section 94-5-102, R.C.M. 1947, states in part:
Deliberate homicide.(1) Except as provided in 94-5-103(1)(a), criminal homicide constitutes deliberate homicide if:
(a) it is committed purposely or knowingly; or

2 Section 94-2-101(52), R.C.M. 1947, defines purposely:
"purposely" - a person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. ...

that a defendant specifically intend the demise of his victim. The intent element in the crime of deliberate homicide is that the State prove a "general intent" that the defendant intended to engage in certain conduct.

> " A major problem of prior Montana criminal law was the use in the code of numerous terms affecting culpability that were largely undefined. Under the new Code, the mental states required for various degrees of culpability are defined carefully in a heirarchy. "Purposely" is the most culpable mental state and implies a design. This term replaces the term frequently used in the old code, "intentionally". It should be noted that a person need not act toward a particular result; he need act only with the object to engage in a certain conduct. "

Commission Comment, Mont. Crim. Code 1973, Ann. p.73.; State v. Klein, Supra; State v. Sharbono , Supra.

Under Montana Law the state is not required to prove that the defendant intended the consequences of his act. Having shown that the defendant engaged in the acts that resulted in the victim's death on purpose it does not matter under Montana Law whether or not he engaged in them with the intent to cause the demise of the victim. Therefore, the presumption has no effect under Montana Law. The question is not whether the defendant intended the consequences rather the question

[3] Section 94-2-101(27), R.C.M. 1947, defines knowingly: "knowingly" - a person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that a circumstance exists. A person acts knowingly with respect to the result of conduct described by a statute defining an offense when he is, aware that it is highly probable that such result will be caused by his conduct. ...

is did he intend the act.[4]

II. THE FEDERAL CIRCUIT COURT CASES ARE INAPPOSITE.

Petitioner states that three Federal Circuit Courts have struck the instruction used by the trial court in this case.

United States v. Chiantese, 560 F.2d 1244(5th Cir.1977), United States v. Garrett, 574 F.2d 778(3rd Cir.1978) and Cohen v. United States, 378 F.2d 751(9th Cir.1967) involved a similar instruction with an additional clause that a person intends the acts "unless the contrary appears." The so called "Mann instruction." Mann v. United States, 319 F.2d 404(5th Cir.1963). The added clause was what the courts found to be inappropriate. Reading the instructions as a whole no prejudice was found and none of these convictions were reversed.

United States v. Bertolotti, 529 F.2d 149(2nd Cir.1975), found the given instruction erroneous because of the strict requirements as to proof of intent in conspiracy trials.

None of the cases cited by petitioner are applicable to the case at hand.

[4] In fact, the effect of the instruction may have been to intimate to the jury that the state was required to prove a "specific intent"; exactly the requirement the New Criminal Code did away with.

CONCLUSION

There being no "specific intent" required for a conviction of deliberate homicide in Montana the instruction cannot be considered in error whether or not it shifts any burden to the defendant as to a "specific intent." This case does not question any holding of Mullaney or Patterson. Respondents, therefore, respectfully request that the Petition be denied.

Respectfully submitted,

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